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**BEFORE THE DEPARTMENT OF WATER RESOURCES  
 OF THE STATE OF IDAHO**

IN THE MATTER OF DISTRIBUTION OF	)	
WATER TO VARIOUS WATER RIGHTS	)	
HELD BY OR FOR THE BENEFIT OF	)	
A&B IRRIGATION DISTRICT, AMERICAN	)	<b>IGWA'S PROPOSED</b>
FALLS RESERVOIR DISTRICT #2, BURLEY	)	<b>FINDINGS OF FACT AND</b>
IRRIGATION DISTRICT, MILNER	)	<b>CONCLUSIONS OF LAW</b>
IRRIGATION DISTRICT, MINIDOKA	)	
IRRIGATION DISTRICT, NORTH SIDE	)	
CANAL COMPANY AND TWIN FALLS	)	
CANAL COMPANY	)	
_____	)	

COME NOW the Idaho Ground Water Appropriators, Inc. ("IGWA"), Aberdeen American Falls Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Clark Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, and North Snake Ground Water District (Ground Water Users) on behalf of their respective members, through counsel, and submit the following Proposed Findings of Fact and Conclusions of Law.

**I. THE DIRECTOR'S CURTAILMENT ORDER VIOLATE THE STATUTORY REQUIREMENT THAT A LOCAL GROUND WATER BOARD BE CONVENED WHENEVER A CALL IS MADE UPON GROUND WATER DIVERTERS.**

**Findings of Fact**

- F1: Idaho Code § 42-602, entitled "Director of the department of water resources to supervise water distribution within water districts," states,

The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

- F2: By letter and petition dated January 14, 2005, the Surface Water Coalition ("SWC") demanded that the Director of the Idaho Department of Water Resources ("IDWR") curtail junior-priority ground water diversion in an attempt to increase the supply of surface water available to senior-priority water rights held by SWC (hereinafter the "SWC delivery call").

- F3: Idaho Code § 42-607, entitled "Distribution of Water," states:

It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply....

- F4: Idaho Code § 42-237A, entitled "Powers of the Director of the Department of Water Resources," states:

The administration of water rights within water districts created or enlarged pursuant to this Act shall be carried out in accordance with the provisions of Title 42, Idaho Code, as the same have been or may hereafter be amended, except that in the administration of ground water

rights either the director of the department of water resources or the watermaster in a water district or the director of the department of water resources outside of a water district shall, upon determining that there is not sufficient water in a well to fill a particular ground water right therein by order, limit or prohibit further withdrawals of water under such right as hereinabove provided, and post a copy of said order at the place where such water is withdrawn; provided, that land, not irrigated with underground water, shall not be subject to any allotment, charge, assessment, levy, or budget for, or in connection with, the distribution or delivery of water.

F5: Idaho Code § 42-237B, entitled “Administrative Determination of Adverse Claims,” states:

Whenever any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affected by one or more user[s] of ground water rights of later priority ... such person ... may make a written statement under oath of such claim to the Director of the Department of Water Resources.

...Upon receipt of such statement, if the Director of the Department deems the statement sufficient and meets the above requirements, the Director of the Department of Resources shall issue a notice setting the matter for hearing before a local ground water board ...

(Underline and emphasis added).

F6: Idaho Code § 42-237C, entitled “Hearing and Order,” states:

Upon such hearing the board shall have authority to determine the existence and nature of the respective water rights claimed by the parties and whether the use of the junior right affects, contrary to the declared policy of this act, the use of the senior right. If the board finds that the use of any junior right or rights so affect the use of senior rights, it may order the holders of the junior right or rights to cease using their right during such period or periods as the board may determine and may provide such cessation shall be either in whole or in part or under such conditions for the repayment of water to senior right holders as the board may determine. Any person violating such an order made hereunder shall be guilty of a misdemeanor.

(Underline and emphasis added).

F7: Idaho Code § 42-237D, entitled “Local Ground Water Boards,” states,

Whenever a written statement of claim as provided in Section 42-237 is filed with the Director then said Director of the Department of Water Resources shall forthwith proceed to form a local ground water board for the purpose of hearing such claim. The said local ground water board shall consist of the director of the department of water resources, and a person who is a qualified engineer or geologist, appointed by the district judge of the judicial district which includes the county in which the well of respondent, or one of the respondents if there be more than one, is located, and a third member to be appointed by the other two, who shall be a resident irrigation farmer of the county in which the well of respondent, or one of the respondents if there be more than one, is located.

(Underline and emphasis added).

- F8: It has been the practice of IDWR to convene a local ground water board as required by these statutes any time a dispute arises over the effects of ground water pumping. (*Carlson Direct*, at 11).
- F9: The Director of the IDWR ("Director") responded to the SWC delivery call by ordering the curtailment of junior-priority ground water rights via its order dated May 2, 2005.
- F10: IDWR did not convene a local ground water board prior or subsequent to issuing the Curtailment Orders.

### **Conclusions of Law**

- C1: The Surface Water Coalition and the junior-priority ground water users against whom the SWC was made are all within a designated water district.
- C2: Idaho Code § 42-602 empowers the Director to "have direction and control of distribution of water from all natural water sources within a water district" and further states that "the provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district." By using the term "all natural water sources," it would appear on the face of this statute that it is the Director who possesses the authority and obligation to direct and control all surface and ground water sources within a water district.
- C3: Idaho Code §§ 42-237A, 42-237B, 42-237C and 42-237D unambiguously mandate that the Director "shall" convene a local ground water board for the purpose of hearing a claim for curtailment against junior-priority ground water rights and that the local ground water board is the entity authorized to determine whether the junior-priority ground water users should be curtailed and in what amount.
- C4: Idaho Code § 42-602 and Idaho Code §§ 42-237A, 42-237B, 42-237C and 42-237D both would appear to apply within water districts. Idaho Code § 42-602 expressly states that it applies within water districts. Idaho Code §§ 42-237A, 42-237B, 42-237C and 42-237D

apply to “any surface or ground water right” and therefore apply to all such rights wherever located within the State, including without limitation water districts.

C5: As a result, Idaho Code § 42-602 and Idaho Code §§ 42-237A, 42-237B, 42-237C and 42-237D appear to be in conflict and do not appear to be reconcilable on their face. Idaho Code § 42-602 appears to give the Director the authority to respond to a delivery call against junior-priority ground water users and Idaho Code §§ 42-237A, 42-237B, 42-237C and 42-237D appear to give that same authority to a local ground water board convened by the Director.

C6: The Idaho Court of Appeals recently reiterated Idaho Supreme Court precedent concerning the following legal principles with regard to conflicting statutes:

The principle that when statutes are in conflict and cannot be reconciled, a more recent or more specific statute controls over an earlier or more general statute was applied in *Paterson*, 128 Idaho 494, 915 P.2d 724, where an award of punitive damages had been made against the state of Idaho for violation of the Idaho Human Rights Act (IHRA), I.C. § 67-5901, *et seq.* The state appealed, arguing that it could not be liable for punitive damages because such damages were barred under the Tort Claims Act, I.C. § 6-918. The court noted that “[a] basic tenet of statutory construction is that when two statutes conflict, the more specific statute controls over the more general,” and held that in the absence of language in the IHRA limiting the state’s liability, “the more specific imposition of liability under IHRA controls over the more general immunity grant contained in I.C. § 6-918.” *Id.* at 502, 915 P.2d at 732. Similarly, in *Johnson*, 138 Idaho at 335, 63 P.3d at 461, the Supreme Court held that a lawsuit contesting a school district levy election was governed by I.C. § 34-2001A--a statute governing bond election and mill levy contests--rather than I.C. § 33-408--which applies to contests of “an election concerning any proposition” submitted to school district voters--because the former statute was the more recent and the more specifically applicable. See also *Mickelsen*, 101 Idaho at 307, 612 P.2d at 544; *H-K Contractors, Inc. v. City of Firth*, 101 Idaho 224, 611 P.2d 1009 (1979). We therefore hold that the FERPA, as the more recent enactment and the one specifically addressing vindication of the fundamental right of religious exercise, governs this action and precludes application of I.C. § 6-610 to prevent an indigent inmate from pursuing a FERPA action.

*Hyde v. Fisher*, 143 Idaho 782, 786-787 (Ct. App. 2007).

C7: Idaho Code § 42-602 is a very general statute which on its face governs all water delivery calls.

- C8: Idaho Code §§ 42-237A, 42-237B, 42-237C and 42-237D are considerably more specific in that they are limited to only those water delivery calls which are made against junior-priority ground water users.
- C9: The first paragraph of Idaho Code § 42-602 was initially enacted in 1915 and the second paragraph thereof was initially enacted in 1903.
- C10: Idaho Code §§ 42-237A, 42-237B, 42-237C and 42-237D were enacted in 1951.
- C11: Based upon the Idaho Supreme Court precedent discussed above, Idaho Code §§ 42-237A, 42-237B, 42-237C and 42-237D must control under the facts of this case because they were more recently enacted and because they more specifically address delivery calls made against junior-priority ground water users.
- C12: There is no legal precedent for the proposition that conflicting statutes may simply be treated as alternative choices within the discretion of the Director, particularly when no statute or law grants the Director such discretion.
- C13: Idaho Code §§ 42-237A, 42-237B, 42-237C and 42-237D mandate that a local ground water board be convened by the Director to determine whether the use of a junior-priority ground water right adversely affects a senior-priority water right such that the junior right must be curtailed in order to increase the supply of water available to the senior right.
- C14: The Director's failure to convene a local ground water board was a violation of Idaho Code §§ 42-237A, 42-237B, 42-237C and 42-237D.
- C15: The Director's order dated May 2, 2005 and all subsequent amendments thereto in this case are hereby vacated and the Director is instructed to convene a local ground water board as mandated by Idaho Code §§ 42-237A, 42-237B, 42-237C and 42-237D.
- C16: Local ground water boards convened by the Director in this case shall adhere to the Rules for the Conjunctive Management of Surface and Ground Water Sources (the "Conjunctive Management Rules") where applicable in determining whether junior-priority ground water rights must be curtailed.
- C17: The Director shall administer the water rights according to the order of the local ground water board pursuant to Title 42 Chapter 6.
- C18: Until such time as the local ground water board makes a determination of adverse impact as set forth in Idaho Code §§ 42-237A, 42-237B, 42-237C and 42-237D and further defined in the Conjunctive Management Rules and Idaho law, neither the Director nor this hearing officer has the authority to issue a curtailment order in this case.

## **II. SENIOR SURFACE WATER RIGHT HOLDERS ARE NOT ENTITLED TO A WATER SUPPLY THAT IS ENHANCED OVER WHAT WAS HISTORICALLY AVAILABLE AT THE TIME OF THEIR ORIGINAL APPROPRIATIONS.**

### **Findings of Fact**

- F11: Findings of Fact Nos. 1 through 18 of the Director's May 2, 2005 Order ("May 2005 Order") are undisputed, supported by competent evidence and therefore should be reaffirmed and adopted. Notwithstanding, the Surface Water Coalition has not submitted all information requested by the Director as set forth in Finding of Fact No. 7. Additionally, the May 2005 Order was issued on an emergency basis based upon inadequate information to make a finding of material injury.
- F12: The ESPA is predominantly basalt. It formed when Quaternary lava flows filled ancestral canyons of the Snake River. In the central part of the ESPA, these basalt formations extend to a depth of more than 3,000 feet. The lava basalts are discontinuous, periodically inter-laid with sedimentary or Aeolian (wind-borne) materials and riven with fractures, joints and lava tubes. (Exhibit 4100 (*Brendecke 12/30/05 Report*) at 5)
- F13: Development of water resources within the Eastern Snake River Plain began in the late 19<sup>th</sup> century with the diversion of surface water rights. The development began in the Henry's Fork and upper reaches of the Snake River mainstream. Several large surface water irrigation projects were constructed in the early part of the 20<sup>th</sup> century which was concentrated further down river in between Neeley and Milner. (Exhibit 4100 (*Brendecke 12/30/2005 Report*) at 5).
- F14: On the Eastern Snake Plain flood irrigation of surface water rights started after the Civil War, was well under way by the turn of the century and continued to expand to the 1950s, at which time there were approximately 1.83 million irrigated acres. Nearly all of this was flood-irrigated by surface water, although the conversion to sprinkler irrigation was just beginning. (*Carlson Direct*, at 7).
- F15: The diversion of surface water for irrigation within the Eastern Snake River Plain resulted in substantial incidental recharge of water to the aquifer. This occurred as a result of seepage and percolation of the surface waters from leaky canals and flood irrigation on farm fields. In other words, the ESPA was being filled with considerable amounts of waste water from surface water diversions. (Exhibit 4100 (*Brendecke 12/30/2005 Report*) at 5; *Carlson Direct*, at 8).
- F16: Flood irrigation practices were very inefficient, resulting in several millions of acre feet of "wasted" water being diverted by percolation into ESPA storage. (*Carlson Direct*, at 8-9).
- F17: Although it is recognized that waste water from surface water irrigation is not the only source of recharge to the ESPA, incidental recharge from surface water irrigation is the primary source of aquifer recharge. About 60% of aquifer recharge is a result of

incidental recharge from surface water irrigation. Other sources of aquifer recharge include seepage from Snake River and other streams, irrigation, canals and farm fields (about 13%), underflow from tributary basins (about 18%) and rain and snow (about 9%). Therefore, aquifer input is approximately one-third natural inputs and two-thirds irrigation-related inputs. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 6).

- F18: The source of the natural flow rights historically available to SWC members consists of two components: (a) natural flow of the Snake River that passes Blackfoot during spring runoff periods (aka “flood flow”) and (b) reach gain that accrues to the river below Blackfoot. Although the reach gain may be subject to depletion by ground water development, flood flow is not because it consists of spring runoff which flows directly into the river. Other than the October 1900 rights of the Twin Falls Canal Company and the North Side Canal Company and sometimes a small fraction of the March 1903 right of the Minidoka Project, the natural flow water rights of the SWC members are and always have been almost entirely dependent upon flood flows. These post-1903 rights don’t have a basis to pursue enhancement of reach gains through curtailment of ground water pumping because they have almost never, since they were first appropriated, been able to utilize those reach gains as a source of supply. Furthermore, even if those reach gains were increased as a result of curtailment, the increased natural flows would first be allocated to the more senior rights of Twin Falls Canal Company and North Side Canal Company. (*Direct Testimony of Brendecke*, at 20-24).
- F19: By 1952, it is estimated that more than 24 million acre feet (MAF) of water had been added to the aquifer as a result of incidental recharge from surface water irrigation waste water. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 6).
- F20: A&B Irrigation District is composed of a small surface water right and a large ground water right. Part A uses surface storage to irrigate approximately 14,660 acres. Part B uses ground water pumping to supply water to about 50,000 acres. All of A& B’s 1939 priority natural flow right is considered to be a “high water right” and only receives water during the spring runoff period after American Falls Reservoir has filled. Historically, the 1939 and 1916 high water rights owned by A&B and other Surface Water Coalition entities were never delivered by the Watermaster prior to 1978 (when Ron Carlson became Watermaster) because they were only on so long as there was “free water” in the river; in other words, so long as there was no need for distribution based on priority. (*Carlson Direct*, at 21-22).
- F21: American Falls Reservoir District #2 (AFRD #2) has very junior surface water rights that are only filled early in the spring. AFRD #2 relies almost entirely on storage in American Falls Reservoir which is implied by the fact that it is organized as a Reservoir District. When high water is available to fill the natural flow right of AFRD #2 it simply has a slightly larger supply than the one anticipated based upon the amount of storage space it accrued in American Falls. Because AFRD #2 water rights are supplied entirely from spring runoff, its water rights are not injured by ground water pumping. (*Carlson Direct*, at 23).



- F22: Burley Irrigation District is organized as an Irrigation District and is part of the Minidoka Project constructed by the Bureau of Reclamation in the first decade of the 20th century. Burley Irrigation District serves about 48,000 acres and typically delivers an average of 5.5 acre-feet per acre from storage. Burley holds a contract for 194,595 acre-feet of storage space in American Falls and Palisades. Reservoir storage represents about 4/5 of a full water supply for Burley Irrigation District. However, Burley Irrigation District operates cooperatively with the Minidoka Irrigation District. Burley Irrigation District and Minidoka Irrigation District have canals that hold a water right for 1,726 cfs with a priority of March 26, 1903. This right and their 1908 right for 1,000 cfs generally will provide up to half of the annual water supply for the Burley and Minidoka Irrigation Districts. Since this water supply is considered to be 100% dependent upon spring runoff, the annual snow pack is the major determinant of the amount of storage Burley will have to use in a given year. During average water years Burley and Minidoka Irrigation Districts would generally carry over up to half of their storage allocation. The Director's Orders properly determined that neither Burley or Minidoka Irrigation Districts have suffered any material injury as a result of ground water pumping. (*Carlson Direct*, at 23-24).
- F23: Milner Irrigation District might be classified as one of the juniors of the juniors. Milner Irrigation District in many ways is nearly identical to the A portion of the A&B Irrigation District. Milner Irrigation District is generally entitled to divert very little natural flow under its April 1, 1939 water right for 121 cfs. However, it is somewhat better off than A&B because it has a slightly earlier high water right with a November 14, 1916 priority date for 135 cfs. The difference between 1916 and 1939 is measured in days, but more significantly, the 1916 water right might come on in a low water year while there may never be water for a 1939 right because of the priority date on the American Falls Reservoir storage water right. Milner Irrigation District holds a contract with the Bureau of Reclamation for 89,450 acre-feet of storage space split almost equally between Palisades and American Falls. Milner Irrigation District has sufficient storage to provide 3.3 acre-feet per acre to 13,640 acres for two years if that were their only water supply. Consequently, the only shortages that Milner Irrigation District may suffer is from renting storage and becoming subject to the last-to-fill provisions of the rental pool. (*Carlson Direct*, at 24-25).
- F24: The Minidoka Irrigation District shares the second most senior right on the river below Blackfoot with Burley Irrigation District. Since the natural flow preferentially goes to Twin Fall Canal Company, Burley and Minidoka Irrigation Districts have relatively larger storage supplies. Minidoka Irrigation District holds a contract for 186,030 acre-feet in the most senior storage rights on Jackson Reservoir. In addition, they hold 82,216 acre-feet in American Falls Reservoir and 35,000 acre-feet in Palisades Reservoir. Burley Irrigation District and Minidoka Irrigation District share 97,000 acre-feet of space in Lake Walcott. Minidoka Irrigation District is the larger of the two Districts, Minidoka Irrigation District provides water to approximately 77,000 acres. The division of storage used between the two districts is computed by the Bureau of Reclamation each year, but as a general rule 40% goes to Burley and 60% goes to Minidoka. The natural flow is divided between the north-side and south-side Minidoka canals and is delivered without

respect to the entity receiving the natural flow. If the storage supplies for Minidoka Irrigation District and Burley Irrigation District are added up they have approximately 619,000 acre-feet of storage for 125,000 acres of land, which is just under the maximum of 5 acre-feet per acre. When their space has filled, Burley Irrigation District and Minidoka Irrigation District have a full water supply from storage even if they receive no natural flow. To date, all shortages experienced by Burley and Minidoka Irrigation Districts can be attributed to past decisions to rent storage to a third party. The Director's Orders correctly determined that Burley and Minidoka Irrigation Districts have not been injured by ground water pumping. (Findings of Fact No. 116 and 120). (*Carlson Direct*, at 25-26).

- F25: North Side Canal Company is another of the junior users among the group of junior users that make up the Surface Water Coalition. While North Side Canal Company shares the earliest right with Twin Falls Canal Company, its share of the 3,400 cfs is only 400 cfs. North Side Canal Company's next right fills after the 1903 right of the Minidoka canals. This is a 2,250 cfs water right bearing a priority date of October 7, 1905. Consequently, North Side Canal Company depends on storage as a source of supply. The 819,000 acre feet of space North Side Canal Company holds contracts for represents nearly 20% of the storage space in the entire system. During recent drought years, North Side Canal Company has diverted up to three quarters of its available storage for use on its lands. (*Carlson Direct*, at 26).
- F26: Twin Falls Canal Co.'s water rights are the most senior of the Surface Water Coalition members. By virtue of their 3,000 cfs October 11, 1900 water right they are entitled to all of the gain in the river that occurs between Blackfoot and Milner during the irrigation season. Because of this fact, they are relatively less dependent upon storage than the other members of the Surface Water Coalition. Twin Falls Canal Co. holds a federal contract for 97,183 acre-feet of space in Jackson and 148,748 acre feet in American Falls. Their American Falls storage right fills before all other American Falls Reservoir space holders. Consequently that portion of their storage supply is secure unless they rent it out to third parties. Twin Falls Canal Company distributes water to approximately 201,000 acres and generally delivers about 5 acre-feet per acre. Their storage supply represents about 20% of their annual required delivery. In most years, Twin Falls Canal Company would need roughly 950, 000 acre-feet based upon a 180 day delivery season. (*Carlson Direct*, at 26-27).
- F27: The Director clearly erred in concluding that Twin Falls Canal Company's minimum full supply was  $\frac{3}{4}$  inch per acre or 1,075,000 acre-feet rather than  $\frac{5}{8}$  inch per acre. Twin Falls Canal Company is the only entity in the Surface Water Coalition who has a legitimate concern about potential impacts of ground water pumping to their natural flow supplies. (*Carlson Direct*, at 26-27).
- F28: Development of ground water pumping in the ESPA began in earnest until the late 1940's and early 1950's. The first federal irrigation project relying heavily on ground water supplies was the Minidoka North Side Pumping Division of the Minidoka Project (now

the A&B Irrigation District) which began in 1948. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 5-6).

- F29: By 1971, approximately 750,000 acres of land on the Eastern Snake River Plain were being irrigated by ground water. (*Carlson Direct*, at 9).
- F30: Ground water development leveled off in the 1980's and a moratorium was imposed in 1992. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 5-6).
- F31: The Twin Falls Canal Company reached its full development in 1930 for use of its surface water rights, most of which have priority dates between 1900 and 1921. Between 1930 and 1948 (when ground water development began by A&B Irrigation District), the average annual surface water diversion was 847.8 KAF. There is no 19-year period in the record for the period from 1930 to 2004 in which Twin Falls Canal Company ever had an average surface water diversion flow less than what they diverted during the period from 1930 to 1948. This reveals that Twin Falls Canal Company surface water diversion flow is as good today as it was before ground water development began within the Eastern Snake River Plain. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 10-11).
- F32: North Side Canal Company first diverted 1 MAF of water in 1925. There is no declining trend in their natural flow diversion. There is no 24-year period since 1948 (when ground water development began by A&B Irrigation District) in which North Side Canal Company's average surface water diversion flow was less than the average for the period from 1925 to 1948. This reveals that North Side Canal Company surface water diversion flow is as good today as it was before ground water development began within the Eastern Snake River Plain. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 11).
- F33: These historical surface water diversion flows reveal that ground water development on the Eastern Snake River Plain has not reduced the amount of natural flow historically available to SWC. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 11).
- F34: Beginning in the 1960 to 1970 time period, surface water supplies have declined as a direct result of the conversion from inefficient gravity flood/furrow irrigation to sprinkler irrigation in surface water irrigation systems and other efficiencies implemented by surface water delivery entities such as the members of the SWC. (Exhibit 3009 (*Director's May 2005 Order*) at Para. 90; *Carlson Direct*)
- F35: These enhanced surface water diversion flows available to SWC cannot be restored absent a return to more wasteful and inefficient irrigation methods such as flood irrigation.
- F36: Despite the plethora of historical data going back to the late 19<sup>th</sup> century, the Director in his May 2005 order relied merely upon Water District Records of diversions and storage by the Surface Water Coalition going back to only 1990. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 24).

- F37: Notably, the 1946 study mentioned above projected water delivery to diversions below Neeley – with the Palisades Project in place and operating – to be 2,847,000 AF with no adverse effects to crop production. This compares to the combined minimum diversion requirement of 3,105,000 AF from the May 2005 order. In other words, the minimum requirement from the May 2005 order is 258,000 AF greater than the 1934 supply anticipated in the operations study even though the 2000-2004 drought was more severe than the drought of the 1930's. Notably, in the Second Supplement Order Amending Replacement Water Requirements issued on December 27, 2005, the Director found (in Finding 17) that the SWC members had diverted a total of 2,837,000 AF during the 2005 irrigation season. This is essentially the same as the drought year seasons diversion anticipated 60 years ago in the 1946 study. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 27).
- F38: The SWC members have experienced at least two droughts. One occurred in the 1930's and other began in 2000. The drought of the 1930's occurred prior to any ground water development on the Eastern Snake River Plain. The evidence shows that these two drought periods are of comparable severity – however, the 2000 drought period was somewhat more severe at least in terms of Heise natural flow deficit than the 1930 drought. Nevertheless, the total natural flow diverted by the SWC members during the 2000's drought period is about as much or more than what they diverted in the 1930's drought period. If ground water development were materially depleting the natural flow supplies of the SWC members, the natural flow diversions in the 2000's drought would have been uniformly less than those of the 1930's drought. However, they were not. Therefore, it can only be concluded that ground water development has not materially reduced the natural flow supplies of the SWC members that which was available to them even under prior comparable drought periods. (*Direct Testimony of Brendecke*, at 17-20; *Carlson Direct*, at 13).
- F39: Across the four irrigation season months, the Blackfoot to Neeley reach gain is almost 90,000 acre-feet greater at the end of the 1950-2006 period than it was at the beginning of the 1912-1949 period which occurred prior to ground water development. This further shows that the summer season reach gain is *greater* now than it was in 1912. In other words, the reach gains have *increased* from what they were at the time of the initial natural flow appropriations of the Twin Falls Canal Company and the North Side Canal Company. Therefore, the SWC delivery call is merely a demand for enhancement of the originally available water supply, or at least for protection of an enhancement that arose after that original appropriation. (*Direct Testimony of Brendecke*, at 13-14).
- F40: The analysis of historical natural flow diversions show that the natural flow supplies of the SWC members are as good or better now than they were before ground water pumping began. Yet the SWC entities seek curtailment of pumping to increase their natural flow supplies. The Director's May 2005 Order's support of this position is flawed.

F41: The drought period starting in 2000 has been the worst consecutive period of drought on record. (*Dreher deposition 12/18/07*). This drought would be expected to be repeated only one time in every 500 years. (*Dreher testimony in TSP case*).

### **Conclusions of Law**

C19: The Ground Water Act § 42-226, *et seq.* applies to any delivery call or request for administration against ground water users.

C20: The Ground Water Act states “while the doctrine of ‘first in time is first in right’ is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.” I.C. § 42-226.

C21: Findings of Fact 41-45 of the Director’s May 2005 Order are not disputed. The Conjunctive Management Rules (“CMR’s”) apply to the facts of this case and further acknowledge all elements of the prior appropriations doctrine as established by Idaho law.

C22: Rule 20.03 of the CMR’s provides as follows:

These rules integrate the administration and use of surface and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water. The policy of reasonable use includes the concepts of priority in time and superiority in right being subject to conditions of reasonable use as the legislature may by law prescribe as provided in Article XV, Section 5, Idaho Constitution, optimum development of water resources in the public interest prescribed in Article XV, Section 7, Idaho Constitution, and full economic development as defined by Idaho law. An appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use of water as described in this rule.

C23: Rule 42.01(d) of the CMR’s requires, with regard to a material injury determination, a consideration of the historical annual volume of water diverted by the senior water right owner making a delivery call.

C24: Rule 43.03(b) of the CMR’s requires the following:

Consideration will be given to the history and seasonal availability of water for diversion so as not to require replacement water at times when the surface right historically has not received a full supply, such as during annual low-flow periods **and extended drought periods**.

(Emphasis added).

- C25: Material injury does not exist if the party making the call is receiving or is anticipated to receive a supply of water equivalent to what the party was able to historically divert. In other words, the calling party is not entitled to more water than the party's historical full supply taking into consideration annual low-flow periods and extended drought periods.
- C26: The Director's failure in his May 2005 Order to consider all of the SWC's historical water supply records – including those relating to SWC's initial appropriations under their water rights which occurred in the late 19<sup>th</sup> and early 20<sup>th</sup> century – constituted reversible error.
- C27: The SWC members have received and are anticipated to receive a water supply equivalent or greater than their historical full water supply. Therefore, the Director should deny the SWC water call.
- C28: It is well established in Idaho that "surface waste and seepage water may be appropriated . . . ***subject to the right of the owner to cease wasting it, or in good faith to change the place or manner of wasting it, or to recapture it, so long as he applies it to a beneficial use.***" *Colthrop v. Mountain Home Irrigation Dist.*, 66 Idaho 173, 79 (1945) (italics in original and bolding added).
- C29: The SWC members are not entitled to a water supply that is enhanced by incidental recharge of waste water over what was historically available at the time of their original appropriations. Because the SWC members are seeking through their water call to an enhancement of their water rights based upon incidental recharge of waste water, the Directors should have denied the SWC water call.

### **III. THE DELIVERY CALLS MADE BY THE SURFACE WATER COALITION MUST BE DENIED BECAUSE THEY HAVE NOT SUFFERED MATERIAL INJURY AS A RESULT OF JUNIOR PRIORITY GROUND WATER PUMPERS.**

#### **Findings of Fact**

- F42: Whether effects of ground water depletions result in material injury to the senior priority surface water rights held by SWC members depends in a large part on the **total water supply**, under **natural flow water rights** and from **reservoir storage**, and from supplemental **ground water rights**, which would otherwise be available to each SWC member in a given year. (Exhibit 3009 (*Directors May 2005 Order*) at Para. 88).
- F43: The Director did not consider ground water rights held by members of the Surface Water Coalition or by shareholders of the members of the Surface Water Coalition members. (*Dreher deposition 12/19/07*). These ground water rights should be considered as part of the SWC water supply.
- F44: Twin Falls Canal Company has a 3,000 cfs water right with a priority date of October 11, 1900 under water right no. 1-209. North Side Canal Company has a 400 cfs water right with the same October 11, 1900 priority date under water right no. 1-210. Both rights are

diverted at Milner Dam into their respective canal systems. The other members of the Surface Water Coalition primarily rely upon storage because their surface water rights are junior in priority to the 1900 priority rights of Twin Falls Canal Company and North Side Canal Company. (*Carlson Direct*, at 12).

**A. Natural Flow Rights**

- F45: The evidence reveals that the natural flow rights available to the Surface Water Coalition have not been materially injured.
- F46: The reach between the near Blackfoot gage and the Neeley gage on the Snake River are particularly important because it contains numerous springs which provide the bulk of gains to river flows between Blackfoot and Milner and form an important part of the water supply to the Surface Water Coalition. The reach gain between the near Blackfoot gage and the Neeley gage on the Snake River was measured in 1905 to be 1,830 cfs. The annual reach gain over the 1912-1927 period averaged 2,480 cfs. The annual reach gain over the 1928-2004 period averaged 2,680 cfs. The reach gain between the near Blackfoot gage and the Neeley gage on the Snake River shows no statistically significant trend over the 93 year period of record and no statistically significant trend between the beginning of ground water development and the year 2000. Although this reach gain exhibits substantial year to year variation, such variation was evident long before the beginning of ground water development on the Eastern Snake River Plain. The fact this reach gain has not experienced a declining trend since the beginning of ground water development, there is no basis for the Surface Water Coalitions allegation that ground water development had detrimentally impacted their surface water rights. (Exhibit 4100 (*Brendecke Report 12/30/05*) at 6-7).
- F47: A double mass analysis is another method of assessing whether there have been changes in hydrologic conditions between two points in a river system. This technique plots the accumulated flow at upstream and downstream points through time. Changes in the intervening flow regime (such as decreased reach gains) are evident as changes in slope of the double mass line. A double mass plot of the combined flow of the Snake River at the near Blackfoot gage and the flow of the Portneuf River versus the flow at the near Minidoka gage reveals no apparent change in slope over the 1950-1990 period of ground water development. This is further evidence that ground pumping has not reduced reach gains in the near Blackfoot to Neeley reach. (Exhibit 4100 (*Brendecke Report 12/30/05*) at 7-8).
- F48: Most of the water rights owned by the Surface Water Coalition have priority dates between 1900 and 1921. When these water rights are compared to records showing the daily flow of the Snake River at Montgomery Ferry in 1905, it is evident that the Surface Water Coalition would have had access to natural flow rights for only a few days in 1905 and that by mid-July 2005 only the senior water rights from 1900 would have been in priority although they would not have been able to divert natural flow at their full decreed amounts. This shows that the Surface Water Coalition members holding more junior natural flow rights would have anticipated even before ground water development began

that those junior natural flow rights would have little or no yield in dry years and that in such years even the most senior natural flow rights would be unable to divert at their decreed amounts. Therefore, even before the advent of ground water development, the Surface Water Coalition could never have expected their natural flow rights to be satisfied from reach gains in the Snake River arising below Blackfoot. (Exhibit 4100 (*Brendecke Report 12/30/05*) at 10). It is unreasonable for the Surface Water Coalition to try and do so now.

- F49: As discussed above in Section I, the facts also show that there has been no reduction of the amount of natural flow historically available to the Surface Water Coalition before ground water development began on the Eastern Snake River Plain. This is further evidence that the Surface Water Coalition's natural flow rights have not been materially injured. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 11).

### **B. Storage Rights**

- F50: Early settlers in the area below Neely realized that natural flow alone would not provide a reliable water supply for large scale irrigation in the Eastern Snake River Plain and that reservoirs would be needed to supply storage water to supplement natural flow supplies. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 11)
- F51: For a table delineating the dates on which each reservoir began operation, see Table 2-1 attached to Exhibit 4100 (*Brendecke Report 12/30/2005*) at 11.
- F52: During 1946, in conjunction with the planning process for the Palisades Reservoir, the USBR published a particularly important report. In the report, the combined operation of the Jackson Lake, American Falls Reservoir, and Palisades Reservoir were simulated over a 1919-1942 hydrologic study period. Notably, this study period was *before* the development of ground water within the Eastern Snake River Plain. This report indicated that the Surface Water Coalition members would have suffered water shortages of 803,000 AF in 1934 and 157,000 AF in 1935 but that "Neither of these shortages would have caused serious crop loss." The report further predicted that such a shortage would likely occur at least once in every 50 years but that development of land based upon the reservoir system should still take place. This report shows that, in 1946, well before any significant ground water development on the Eastern Snake River Plain, the Surface Water Coalition members who rely upon Jackson Lake, Palisades Reservoir, and American Falls Reservoir anticipated that they would suffer shortages as high as 20% in very dry years even with all three reservoirs fully operational. In 1955, the USBR issued another report updating the previous 1946 report. The 1955 report utilized a study period of 1918-1947. Notably, this study period also was *before* the development of ground water within the Eastern Snake River Plain. This updated report found that the American Falls Reservoir would not have filled in any year of the 1932-1935 period and that A&B Irrigation District would have suffered shortages of 25% in 1935. In 1969, the USBR carried out a new study of the reservoir system which ultimately showed that the existing reservoir system consisting of Jackson Lake, Palisades Reservoir and American Falls



Reservoir were projected to be empty at the end of the irrigation season in both 1934 and 1935. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 12-13).

- F53: The Bureau of Reclamation's Expert, Patrick McGrane testified in his deposition that the BOR did not expect their entire reservoir system to fill every year. (*McGrane deposition* p. 110 l. 12-22). Rather, the reservoir system was expected to fill roughly 66% of the time and in fact has filled roughly 66% of the time since all of the major reservoirs have been built.
- F54: These historical studies make it clear that the present system of reservoirs relied upon by the SWC entitles was never designed nor expected to fill or prevent water shortages in very dry years. It is, therefore, reasonable to conclude that shortages in an extremely dry period, such as the period from 2000-2004, were expected by the Surface Water Coalition regardless of any potential impact of future ground water development. In other words, the Surface Water Coalition fully anticipated shortages in extremely dry years even if ground water development had never occurred or was now fully curtailed. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 13).
- F55: As mentioned above, the studies completed by the USBR based upon pre-ground water development study periods indicate that the three reservoirs – Jackson Lake, Palisades and American Falls – would have been empty in 1934 and would have failed to fill any of the four years from 1932 to 1935. In stark contrast, the combined active storage in the three reservoirs at the end of 2004 was 476,600 AF and the combined carryover storage of the Surface Water Coalition members was 288,300 AF. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 14).
- F56: The yield of Jackson Lake and Palisades storage rights cannot be directly affected by ground water development because they fill from basins outside the Eastern Snake River Plain. Their yields could however be affected by whether or not the more senior storage rights downstream in American Falls Reservoir have filled and the Snake River flows below Heise that are tributary to American Falls Reservoir are potentially affected by ground water development. However, because the system of storage reservoirs did not reach its current capacity until after ground water development began, it is difficult to directly assess how such development has affected the yield of storage rights held by the Surface Water Coalition. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 14-15).
- F57: There are no significant declining trends in the initial storage allocations of the Surface Water Coalition such as might be expected if ground water development had as alleged significantly affected storage supplies. Indeed, the initial storage allocations of the Surface Water Coalition members have been relatively steady and quite reliable since 1960, though not invariable through the entire 1960-2004 period. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 15). This is precisely what was anticipated in the 1946 USBR study mentioned above. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 15).

- F58: Records reveal that, since 1960, the initial storage allocations of the Surface Water Coalition members have averaged 89% of their contracted space and that the contracted space has filled in most years. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 15).
- F59: The lack of declining trends in storage allocations is consistent with the lack of statistical evidence of ground water impact on observed reach gains in the near Blackfoot to Neeley reach that encompass American Falls Reservoir. This was discussed above. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 15)
- F60: In 1979, the District 01 Water Bank was formally organized, which allowed bank-like leasing of storage supplies. The records of such leasing activities is a reasonable indicator of whether those entities perceived their storage supplies to be more or less than adequate in any given year. In other words, any leasing of water by the Surface Water Coalition members is an indication that felt their supplies were more than adequate and that they had spare water to lease. Records reveal that since the adoption of the District 01 Water Bank, many members of the Surface Water Coalition have been regular contributors to the water bank. This is a behavior which suggests they believed they had excess supplies in most years. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 15-16).
- F61: As mentioned above, the reservoir system was intended from its inception to provide supplemental water to already existent natural flow rights. The decisions of the members of the Surface Water Coalition's to lease their storage water to third parties is further indication that it was not needed to supplement their natural flow rights and that they had sufficient and adequate natural flow rights at least in those years that the rights were leased. Any shortages in natural flow rights in those years can only be attributable to the storage water leases agreed to by the Surface Water Coalition. It is unconscionable to allow the Surface Water Coalition to monetarily benefit from these water leases and then seek to assess any shortage in natural flow or carry over against junior priority ground water users.

### **C. Ground Water Rights**

- F62: In addition to natural flow right and storage water supplies, ground water rights are also available to water users served by some of the Surface Water Coalition members. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 16).
- F63: Nearly 75,000 acres claimed by the Surface Water Coalition members in the SRBA have supplemental ground water rights. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 16). The ground water rights for these 75,000 acres represent a substantial alternative water supply. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 26).
- F64: The Director's May 2005 order does not explicitly consider these supplement ground water right. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 16).
- F65: Although the Conjunctive Management Rules provide that the availability of wells is a relevant factor in analyzing material injury (IDAPA 37.03.11.41.01.h) and the May 2005

order states that the analysis of “total water supply” is relevant, the availability of alternative ground water supplies was not considered in the May 2005 order. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 26).

#### **D. Other Considerations**

- F66: In 2005, Twin Falls Canal Company actually diverted 912,968 AF of water. This is significantly less than the 1,075,000 AF minimum full supply the Director found in his May 2005 order. The difference between the Director’s minimum full supply and what Twin Falls Canal Company actually diverted for their needs was 157,889 AF. Of the 912,968 AF diverted, 177,500 AF was storage. Nevertheless, Twin Falls Canal Company had a full water supply because they actually did not even use all of their available water supply and in fact carried over about 60,000 AF of storage at the end of the year. (*Carlson Direct*, at 28).
- F67: Carryover reflects a surplus water supply. Its existence indicates there was more water available for water users to use than was needed in a given year for irrigation purposes. As long as a water user has a full supply of water in the current irrigation season there can be no material injury in that year. (*Carlson Direct*, at 31).
- F68: Despite variations in surface water and storage available, the testimony of all SWC experts readily acknowledge SWC members have not been required to dry up acres nor have any reductions in crop yields been documented as a result of water supply shortages.

#### **Conclusions of Law**

- C30: “[W]ater rights adjudications neither address, nor answer, the questions presented in delivery calls....” *American Falls Reservoir Dist. No. 2 v. Idaho Dep’t of Water Resources*, 154 P.3d 433, 447 (2007)
- C31: The partial decrees define the amount of water that a water user is entitled to when available and can be applied to beneficial use. It is a maximum amount, not a guaranteed amount.
- C32: Conjunctive Management Rule 42.01 factors apply in this case as follows:

**Factor 01.a**, requires the Director to determine the amount of water available “in the source from which the water is diverted.” The source in this case is two-fold: the natural or pre-development supply; and, the subsequently artificially enhanced flows resulting from incidental recharge due to waste water seepage into the ESPA.

**Factor 01.b**, the “effort” or “expense” of the water right holder to divert water from the source. In this case, the “effort” by the senior water right holder to divert water from the ESPA is none. There is no evidence in this case that the effort or expense of diverting water under the SWC water rights have ever been increased as a result of any alleged water shortage. Rather, any change in the effort or expense in diverting water under

these water rights has been the product of economic facts unrelated to water. (*See Church Direct*)

**Factor 01.c**, concerns whether the exercise of the junior-priority ground water user affects the quantity and timing of when water is available to the senior. Although some ground water pumping may affect the quantity and timing to water diverted under the SWC water rights, whether those ground water users are junior or senior to the springs is unknown. Additionally, the evidence reveals that ground water pumping has not impacted the amount of water that SWC was historically able to divert under its water rights.

**Factor 01.d** requires, if for irrigation a consideration of the rate of diversion compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application. As discussed below, the Director utterly failed to consider the “acreage of land served” by the SWC members or their proper historical rates of diversion.

**Factor 01.e** concerns the amount of water being diverted and used compared to the water rights. Again, the Director failed to consider the proper historical amount of water diverted under the SWC water rights.

**Factor 01.h**, the extent to which the senior water right could be met “using alternate reasonable means of diversion or alternate points of diversion, including the construction of wells.” There has been consideration of whether construction of wells would be a reasonable alternate means of diversion in this case.

- C33: The Director failed to properly consider in his May 2005 Order all sources of water available to the SWC members. These sources include surface water rights, storage rights, and ground water rights. A review of all of these water sources reveals that the SWC members have not suffered material injury in this case.
- C34: SWC members cannot have suffered material injury because there is no evidence suggesting that the SWC members have had to dry up acreage or have suffered any loss of crop yields.
- C35: SWC members cannot have suffered material injury because they have not expended all of their storage water and have instead opted to lease it to third parties.
- C36: SWC members cannot have suffered material injury because there is currently more water available to them and they are currently able to divert more water than they were able to originally divert under their water rights based upon historical records discussed above.

**IV. THE DIRECTOR'S MAY 2005 ORDER FAILED TO PROPERLY CALCULATE THE THRESHOLD INJURY VALUE.**

**Findings of Fact**

- F69: The Director's May 2005 Order states that information submitted for American Falls Reservoir district #2, the North Side Canal Company, and the Twin Falls Canal Company defined full headgate deliveries for each of these members as average rates of diversion at the shareholder headgates during each month of the irrigation season of 5/8-inch, 5/8-inch, and 3/4-inch, respectively. The Director then used these respective numbers in calculating the minimum full head-gate diversion for each entity. (Exhibit 3009 (*Director's May 2005 Order*) at Para. 89-93).
- F70: In the May 2005 order, the Director established two threshold criteria for determining the degree to which pumping by junior ground water rights caused material injury to senior surface water rights of the SWC members. The first criterion was an in-season diversion requirement determined as the "... minimum supply ... recently diverted ... for full head-gate deliveries. ...". The second criterion was a "reasonable carryover" requirement determined from an analysis of storage carryover in previous drought years. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 24).
- F71: The term "head-gate delivery" refers generally to the amount of water made available by a canal company or irrigation district at the turnouts to shareholders. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 16).
- F72: With respect to the full head-gate delivery requirement, the Director relied heavily on representations by three of the Surface Water Coalition members in determining that it was the ability of American Falls Reservoir District #2 and the North Side Canal Company to deliver 5/8 of a miners inch per acre and the ability of Twin Falls Canal Company to divert 3/4 of a miners inch per acre. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 24-25).
- F73: None of the other four members of the Surface Water Coalition ever indicated in their submittals to the Director what they considered to be full deliveries to their users. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 25).
- F74: The Director's determination that full head-gate delivery for Twin Falls Canal Company is 3/4 of a miners inch per acre is materially incorrect. Full head-gate delivery for Twin Falls Canal Company is the same as it is for American Falls Reservoir District #2 and North Side Canal Company. It is the ability to divert 5/8 of a miners inch per acre. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 25).
- F75: The Twin Falls Canal Company Operation Policy (1998) states that the company's water right is 5/8 of a miners inch per share. In its 1999 Water Management Plan, the company states that the system was planned and constructed to deliver 1 cfs per 80 acres which converts to 5/8 of a miners inch per acre. This is consistent with the 1912 Idaho Supreme

Court case of *State v. Twin Falls Canal Company Company*. Furthermore, testimony of the company's officials (*See Deposition of Jay Barlogi at 20*) is that canal breaks and other operational problems are more difficult to control at a delivery rate of  $\frac{3}{4}$  inch.

- F76: The planning and policy documents submitted by North Side Canal Company and American Falls Reservoir District #2 indicate that a full head-gate delivery for those entities is  $\frac{5}{8}$  of a miners inch. Likewise, the planning and policy documents submitted by Twin Falls Canal Company also indicates that a full head-gate delivery for it is also  $\frac{5}{8}$  of a miners inch and not the  $\frac{3}{4}$  of a miners inches used by the Director in the May 2005 order. Exhibits 4166 and 4167 and Carlson Direct at
- F77: A review of the 1990-2004 delivery information submitted by Twin Falls Canal Company reveals that headgate deliveries of  $\frac{5}{8}$  of a miners inch occurred in 1994, 2002 and 2003. The minimum diversion among these three years was 2002 in which the total headgate delivery was only 1,009,100 AF. This compares to the threshold of 1,075,900 AF in the Director's May 2005 order. Thus, if the minimum amount recently diverted for full head-gate delivery is the appropriate standard and had been consistently applied of the 1990-2004 data provided by Twin Falls Canal Company, the season injury threshold would have been 66,800 AF small than what was adopted in the Director's May 2005 order. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 25; *Carlson Direct*, at 30).
- F78: It is possible that the seasonal injury thresholds for the Surface Water Coalition members would have been even smaller had a longer historical period than 1990-2004 been considered. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 25).
- F79: Also, adopting the 2002 diversion as the injury threshold for Twin Falls Canal Company would put it in a similar frequency class as the other Surface Water Coalition members. The seasonal injury thresholds for the other six SWC members all fall in the 10<sup>th</sup> to 30<sup>th</sup> percentile range of their historical diversions. In contrast, the seasonal injury threshold for Twin Falls Canal Company as adopted by the May 2005 order is in the 50<sup>th</sup> percentile of their historical diversions. Using the 2002 diversion to define the threshold would place Twin Falls Canal Company's season injury threshold in the lowest 18% of years, which is an outcome more consistent with the protections provided by other SWC members in the May 2005 order and more representative of Twin Falls Canal Company's historical experience in drought periods before substantial ground water development. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 25).
- F80: Assuming that the standard of "minimum amount recently diverted for full head-gate delivery" adopted in the May 2005 order is appropriate for determining a threshold injury value, the thresholds adopted in the May 2005 order do not appear to have been properly determined. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 27).
- F81: In fact, the difference between  $\frac{3}{4}$  inch and  $\frac{5}{8}$  inch translates (in the Director's calculations) into an annual supply difference of 75,000 AF. This difference is greater than the material injury to Twin Falls Canal Company found by the Director in any of his orders. (*Direct Testimony of Brendecke*, at 30).

### **Conclusions of Law**

- C37: The evidence reveals that for Twin Falls Canal Company a full headgate delivery is 5/8 of a miner's inch.
- C38: The Directors use of 3/4 inch as the full headgate delivery from Twin Falls Canal Company was reversible error.
- C39: Therefore, the analysis in the May 2005 Order concerning full headgate delivery for Twin Falls Canal Company is flawed and must be recalculated based upon a full headgate delivery of 5/8 inch.

### **V. IT IS REASONABLE BASED UPON HISTORICAL EXPECTATIONS FOR CARRYOVER STORAGE TO BE ZERO.**

### **Findings of Fact**

- F82: Carryover storage is water stored in reservoirs which is unused during the irrigation season and remains in storage for the following year. (*Carlson Direct*, at 31).
- F83: Carryover reflects a surplus water supply. Its existence indicates there was more water available for water users to use than was needed in a given year for irrigation purposes. (*Carlson Direct*, at 31).
- F84: Carryover of storage water can and often is lost and wasted if the reservoir system fills over the following winter and spills in the spring. The risk of storage water being spilled and lost is one that should be borne by the right holder who wishes to speculate – in that case that is the SWC and not junior ground water users. To shut off a junior groundwater user or require mitigation to provide storage carry-over water would be imposing an obligation in a future year that bears no reasonable relationship to what is needed for the beneficial use of the water right this year: to grow crops in the present irrigation season. This often would result water being wasted and lost from the basin during flood. (*Carlson Direct*, at 31-32).
- F85: The 1946 study by the USBR discussed above also predicted that there would be no carryover storage at the end of 1934 and 1935 in the four system reservoirs relied upon by the Surface Water Coalition members. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 27; *Direct Testimony of Brendecke*, at 26).
- F86: The 1946 study shows that the A&B Irrigation District in particular would have had zero carryover storage by the end of the 1935 year. Therefore, A&B Irrigation District could never have anticipated having any natural flow or carryover storage in severe drought periods. Nor could it have anticipated a full water supply from storage in such periods. (Exhibit 4100 (*Direct Testimony of Brendecke*) at 25).

- F87: Based on the 1946 study, it is clear that the Bureau and its clients, the SWC members, could never have anticipated or expected that the present reservoir system would eliminate water shortages in severe drought years and could never have expected to have any carryover storage left in such years. (Exhibit 4100 (*Direct Testimony of Brendecke*) at 24-25).
- F88: Nevertheless, the combined “reasonable carryover” threshold for the Surface Water Coalition members established in the May 2005 order is 188,600 AF and the actual 2005 carryover, according to the Director’s Second Supplemental Order was 783,100 AF. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 27).

### **Conclusions of Law**

- C40: The Conjunctive Management Rules require consideration of supplies available under prior comparable water conditions in determining material injury and mitigation requirements.
- C41: The Idaho Supreme Court has rejected the concept that SWC members (or anyone else) is entitled to keep their reservoirs full at all times just in case of a dry year. *AFRD#2 v. IDWR*, 143 Idaho 862, 880, 154 P.3d 433, 451 (1997).
- C42: “Concurrent with the right to use water ‘first in time’ in Idaho, is the obligation to put the water to beneficial use. To permit excessive carryover of stored water without regard to the need for it would be in itself unconstitutional.” *AFRD#2 v. IDWR*, 143 Idaho 862, 880, 154 P.3d 433, 451 (1997).
- C43: The facts show that water supplies available during 1930’s drought SWC had significant shortages of storage water supplies and would have had zero carryover storage. So, SWC cannot now demand in the recent and comparable drought that ground water users provide them with full storage supplies and carryover storage.
- C44: It is not reasonable to allow any carryover storage when none was expected or anticipated by the SWC during severe drought conditions. To do so would be to give the SWC an unexpected and unreasonable windfall.
- C45: Therefore, under the facts of this case, the Director should have determined that in severe drought conditions reasonable carryover storage allowable to SWC should be zero, in accordance with their historical expectations.
- VI. THE DIRECTOR’S MAY 2005 ORDER FAILS TO CONSIDER ACTUAL CROP IRRIGATION REQUIREMENTS AND ACTUAL OR CLAIMED IRRIGATED ACREAGE WITHIN THE SURFACE WATER COALITION SERVICE AREAS.**

### **Findings of Fact**



- F89: The Director's May 2005 order acknowledges that actual irrigation requirements vary from year to year based upon climate, crop selection, irrigated acreage and other factors. However, the thresholds adopted in the Order are not based on a determination of crop irrigation requirements and consider neither the actual nor the claimed irrigated acreage within the Surface Water Coalition service areas. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 27).
- F90: The 2005 irrigation season is a good example. In that year, the cool, wet spring reduced irrigation demands substantially allowing all but the most junior storage priorities to fill. Neither the May 2005 order nor the Second Supplemental Order contain an analysis of such factors. Nor do they consider whether there are significant areas within the SWC member's service areas that are not irrigated and how such areas would affect the diversions necessary to provide full deliveries. Based on the foregoing, it is evident that the Director's May 2005 order did not consider the actual beneficial use irrigation needs of the SWC members in 2005. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 27).
- F91: Twin Falls Canal Company originally claimed 201,560.4 acres as its place of use for its irrigation water rights. However, mapping files agreed upon by Twin Falls Canal Company showed that they were claiming 198,632 acres. An analysis based upon field investigation and imagery interpretation based upon imagery from 1987 and 2004 reveals that at least 15,043 of these acres were actually not irrigated. This represents 7.6% of the total amount claimed by Twin Falls canal Company. The amount of water associated with these non-irrigated unreported acres is 144,600 AF based upon a diversion of  $\frac{3}{4}$  inch 102,000 AF based upon a diversion of  $\frac{5}{8}$  inch. (Exhibit 4300 (*King Report 3/20/07*))
- F92: Minidoka Irrigation District originally claimed 77,490 acres as its place of use for its irrigation water rights. However, mapping files agreed upon by Minidoka Irrigation District showed that they were claiming 75,152 acres. An analysis based upon imagery interpretation based upon imagery from 1987 and 2004 reveals that at least 5008 of these acres were actually not irrigated. This represents 6.7% of the total amount claimed by Minidoka Irrigation District. (Exhibit 4300 *King Report 12/29/05*)
- F93: Burley Irrigation District originally claimed 47,818 acres as its place of use for its irrigation water rights. However, mapping files agreed upon by Burley Irrigation District showed that they were claiming 47,622 acres. An analysis based upon imagery interpretation based upon imagery from 1987 and 2004 reveals that at least 2907 of these acres were actually not irrigated. This represents 6.1% of the total amount claimed by Burley Irrigation District. (Exhibit 4300 *King Report 12/29/05*)
- F94: Non-irrigated acres must not be used to determine irrigation water supply requirements. (*King Direct*, at 10).

### **Conclusions of Law**

- C46: Conjunctive Management Rule 42.01.d instructs the Director, when determining material injury with regard to a water call for irrigation water, to consider the rate of diversion

*compared to the acreage of land served, the annual volume of water diverted, the system diversion and conveyance efficiency, and the method of irrigation water application.*

- C47: The Director utterly failed to consider the “acreage of land served” by the SWC members or their proper historical rates of diversion.
- C48: As indicated by the facts, the SWC members have misrepresented the actual number of acres served by their water rights.
- C49: Furthermore, the thresholds adopted by the Director in his May 2005 Order are not based on a determination of crop irrigation requirements and consider neither the actual nor the claimed irrigated acreage within the Surface Water Coalition service areas.
- C50: The Director’s failure to properly consider the actual acreage of land served by the SWC members’ water rights and his failure to properly consider actual crop irrigation requirements constitute reversible error requiring vacation of the Director’s May 2005 Order.

**VII. THE DELIVERY CALLS MADE BY THE SURFACE WATER COALITION UNREASONABLY INTERFERE IN VIOLATION OF LAW WITH THE OPTIMUM BENEFICIAL USE AND FULL ECONOMIC DEVELOPMENT OF THE EASTERN SNAKE PLAIN AQUIFER.**

**Findings of Fact**

- F95: A curtailment of a large number of ESPA junior groundwater right holders beginning spring 2005 would have a *near-immediate economic impact this year, and follow-on impacts in future years*. To the extent that such a curtailment actually puts farms or other enterprises out of business permanently, the near-term impact also would become a long term impact. (Exhibit 4400 (*Affidavit of Church 3/22/05*) at 10).
- F96: The economic changes that would be realized by the surface water users are predicted to accumulate over time. It will take months or years (depending on the location) for the shut-off of groundwater pumping to result in increased surface water availability.
- F97: Such increases, when they are felt, will begin with relatively small amounts in year one and, provided the wells remain shut off, increase toward a steady-state over a relatively long time period (i.e., thirty years or more).
- F98: The initial benefits to the SWC will be much less than the amount predicted because the prediction does not take into account the time it will take for the SWC to realize benefit from a curtailment. The first few years of either the 1949 and 1961 curtailment scenarios do not bring significant economic gains to the surface water users. The economic benefits in the form of gross sales to all SWC members and spring users is estimated to be only \$0.9 million in the first year of curtailment. (Exhibit 4400 (*Affidavit of Church 3/22/05*) at 12, 16).

- F99: The total value of output impact on ground water right holders remains constant at negative (-) \$211 million. Therefore, in the first year of curtailment, the relative net economic impact is estimated to be in excess of negative (-) \$210 million. (Exhibit 4400 (*Affidavit of Church 3/22/05*) at 12).
- F100: The economic damage to the curtailed ground water users, when measured in terms of the nominal dollar value of economic output, is nearly 23 times larger than the predicted economic gains. (Exhibit 4400 (*Affidavit of Church 3/22/05*) at 12).
- F101: A curtailment based upon a 1949 or 1961 curtailment date would result in economic decrease in the economic output, again measured in dollar value added to increased economic output, would be nearly \$143.1 million in the Eastern Snake River Plain counties and \$157.7 million statewide. Under the 1949 curtailment, the negative economic impact to be a loss of nearly \$212.7 million annually in the Eastern Snake River Plain and \$234.4 million annually statewide. (Exhibit 4400 (*Affidavit of Church 3/22/05*) at 13).
- F102: Notably, the highest predicted annual economic gain resulting amounts to only about 1/7 (one-seventh) of the estimated annual economic damage from a ground water curtailment that begins in year one and increases gradually each year thereafter. (Exhibit 4400 (*Affidavit of Church 3/22/05*) at 13).
- F103: The present value of the projected reduction in Idaho's annual gross State product (GSP) over the next thirty years due to a curtailment of groundwater supplies is \$3.4458 billion in today's dollars in the 1961 curtailment scenario and \$8.1284 billion in the 1949 curtailment scenario. A significant portion of this cumulative loss will occur regardless of whether a curtailment is imposed for one year or multiple years since most ground water irrigated farm operations would not be able to remain in business following the first year of full curtailment. The present value of the projected economic gain to the Idaho GSP assumed to accrue to the surface and aquaculture water users is \$167.2 million in the 1961 curtailment scenario and \$423.6 million in the 1949 curtailment scenario. Another way to look at these economic tradeoffs is to consider that **for every dollar that the state's economy may gain in output from the surface/spring water users by ground water curtailment, it loses nearly \$20 in output because of the lost agricultural production from groundwater.** (Exhibit 4400 (*Affidavit of Church 3/22/05*) at 15-16, 18).
- F104: In the first year of curtailment under the 1961 curtailment, the assumption of increased water availability produces only \$4.2 million in Idaho GSP while the value of lost output from the ground water users reduces Idaho GSP nearly \$211.0 million. In the first year of the 1949 curtailment, the assumption of increased water availability produces only \$11.1 million to Idaho GSP while the value of lost output from ground water users reduces Idaho GSP nearly \$488.9 million. (Exhibit 4400 (*Affidavit of Church 3/22/05*) at 17).

- F105: A significant portion of the cumulative loss to the Idaho GSP will occur regardless of whether the curtailment is imposed for one year or multiple years since most ground water irrigated farm operations would not be able to remain in business following the first year of full curtailment. (Exhibit 4400 (*Affidavit of Church 3/22/05*) at 18).
- F106: Even including assumptions that are more conservative in evaluating the potential economic gains that may be realized by the surface/spring water users shows that **for every dollar that the state's economy may gain in output from the surface/spring water users by ground water curtailment, it loses nearly \$12 in output because of the lost agricultural production from groundwater.** (Exhibit 4400 (*Affidavit of Church 3/22/05*) at 18).
- F107: Whether we are considering a \$20 loss for every \$1 gain or a \$12 loss for every \$1 gain, the economic realities do not materially change. The economic harm to Idaho's economy is not offset by the potential economic gain. This demonstrates that the overall, negative economic impact of a curtailment will be to impose significant economic damages, annually, to Idaho's economy as a whole. (Exhibit 4400 (*Affidavit of Church 3/22/05*) at 18-19).
- F108: The SWC's claims that surface water users have had to shoulder the burden of increased capital expenditures to conserve water do to ground water pumping is incorrect and merely a red herring. A review of Idaho farmer's responses the U.S Department of Agriculture's 2003 Farm and Ranch Irrigation Survey reveals other motives for the installation of sprinkler equipment. Out of the 5,135 Idaho farms (representing 1.85 million acres of irrigated land) that had implemented irrigation system improvements in the previous 5 years 62.3 percent of them found that it reduced water requirements. But, 57.6 percent found that the improvements improved crop yield - a measure that would improve the surface water users profitability; 34.3 percent found that irrigation system improvements reduced labor costs - another measure that would improve the surface water users profitability; 34.6 percent found that irrigation system improvements reduced energy costs - another measure that improves profitability; and 15.8 percent found that irrigation system improvements reduced fertilizer and pesticide losses another measure that would improve profitability. In other words, the actual facts available on this subject suggests that surface irrigators for many years have been acting in an economically rational way to make their operations more efficient for a variety of familiar reasons related to profitability. None of the responses indicate that these farmers have been responding in any measurable way to alleged concerns about ground water pumping. (Exhibit 4400 (*Affidavit of Church 3/22/05*) at 19-20).
- F109: Full economic development of Idaho's water resource would be thwarted from a curtailment of ESPA groundwater users during periodic periods of severe drought. A groundwater curtailment program implemented today would not result in a turnaround in the availability of surface or spring waters tomorrow, or next year. However, the turn-off of groundwater irrigation sources will result in a nearly-immediate, and largely permanent net loss of annual economic output in southern Idaho, including a loss of nearly 3,500 jobs, at least a \$160 million near-term decrease in the area's annual personal

income, and a loss of between \$4.4 to 7.0 million in annual local property tax revenues. Furthermore, it will impose an economic cost on the rest of Idaho. (Exhibit 4400 (*Affidavit of Church 3/22/05*) at 20-21).

F110: Curtailment of junior ground water rights to produce relatively small short-term benefits to senior surface water supplies will unavoidably put ground water irrigators out of the irrigated farming business. Capital equipment will be idled. Given such a curtailment and the likelihood that it would be continued or repeated, it is unlikely that these idled farms would ever return to production. The most likely result will be that such a curtailment will spell the end of much of the agricultural economy dependent upon ESPA ground water. (Exhibit 4400 (*Affidavit of Church 3/22/05*) at 21).

F111: Curtailing ground water irrigators would be dramatic and immediate. A shutting down of ground water irrigators' pumps leaves no transition to a more efficient method, it leaves no possibility of salvaging a portion of a crop, nor does it leave an opportunity for the ground water user to reallocate any remaining water supplies, or resort to storage, to lessen the harm. (Exhibit 4400 (*Affidavit of Church 12/30/05*) at 7).

F112: On consequence of a widespread curtailment of ground water pumping likely would be that thousands of acres of ground water irrigated potatoes would be kept out of production, market supply would decrease, and the market price would increase for those potato producers who remain in operation, such as the SWC members. (Exhibit 4400 (*Affidavit of Church 12/30/05*) at 8-9).

F113: Curtailing ground water irrigation under either the 1949 or 1969 scenario would result in an immediate and largely permanent net loss of annual economic output in southern Idaho, including the loss of nearly 3,500 jobs, at least \$160 million near term decrease in the area's personal annual income, and a loss of between \$4.4 to \$ 7 million in annual local property tax revenues. (*Church Direct 12/30/05*, at 6).

F114: The concept of pursuing full economic development of Idaho's groundwater resources is wholly inconsistent with any alternative that regulates the list of the state's water resources to cause the state's economy to lose a present value of close to \$8.1 billion in gross output during the next thirty years to gain a present value of \$423.5 million. Whether or not, in the near-term, a curtailment of ESPA groundwater users would be considered a "futile call," it is quite evident that, in both the near and long terms, it would cause substantial and likely permanent, harm to Idaho's economy that, in its first year alone, would overwhelm any possible long-term gain. An approach that is consistent with state policies of optimizing or maximizing beneficial uses of the State's water resources consistent with full economic development of ground water within the ESPA would be to implement measures that can maximize economic benefits while phasing in any improvements in aquifer water levels that are designed to improve surface water supplies and minimize the effects of future droughts without causing the disruptions of groundwater curtailment and loss of farm-dependent economies. For any such program to adhere to the principal of maximizing economic development, it would have to keep

ground water pumpers in business as irrigators. (Exhibit 4400 (*Affidavit of Church* 3/22/05) at 21-22).

### **Conclusions of Law**

- C51: The Idaho Constitution and state statutes provide that all waters in the state are the “property of the state,” and are dedicated to “public use.” I.C. § 42-101 et seq.; Idaho Const., Art. 15, §§ 1, 3 and 7. The state is charged with the responsibility to control the allocation of water and “in providing for its use shall equally guard all the various interests involved.” I.C. § 42-101. Because the water resources of this state are dedicated to public use, the right of appropriation “is not an unrestricted right, but must be exercised with some regard to the rights of the public.” *Schodde v. Twin Falls Water Co.*, 224 U.S. 107, 120 (1911).
- C52: As between appropriators, priority in time gives superiority in right, except that the right of prior appropriation is tempered by such reasonable limitations as are necessary to achieve “optimum development of water resources in the public interest.” *Id.* at §§ 5 and 7; I.C. §§ 42-1734A(1)(b). The Idaho Constitution declares that “[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied.” *Id.* Const. Art. 15, § 3. Therefore, “It is the policy of the state of Idaho to promote and encourage the optimum development ... of the water resources of this state.” I.C. § 42-234; *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911); *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960).
- C53: The law of optimum development of water resources includes a legislative mandate that “while the doctrine of ‘first in time is first in right’ is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources.” I.C. § 42-226. The policy of full economic development is grounded in the legislature’s constitutional authority to place reasonable limitations on priority of right, and “is consistent with the constitutionally enunciated policy of promoting optimum development of water resources in the public interest.” *Baker*, 513 P.2d at 636; Idaho Const., Art. 15, § 7. A water right “must be exercised with reference to the general condition of the country and the necessities of the people, and not so to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.” *Schodde*, 224 U.S. at 120 (quoting *Basey v. Gallagher*, 87 U.S. 670, 683 (1874)). The Idaho Supreme Court recently confirmed that “the reasonableness of use and full economic development” are essential to the lawful administration of Idaho’s water resources. *American Falls Reservoir District No. 2, et al. v. The Idaho Department of Water Resources, et al.* (“AFRD2”), \_\_\_ Idaho \_\_\_, 154 P.3d 433, 447 (2007).
- C54: The law of optimum development provides that “[a]n appropriator is not entitled to command the entirety of large volumes of water in a surface or ground water source to support his appropriation contrary to the public policy of reasonable use....” IDAPA 37.03.11.010.08; *Schodde*, 224 U.S. 118-121. Under Idaho law, a senior appropriator “is not absolutely protected in either his historic water level or his historic means of diversion. Our Ground Water Act contemplates that in some situations senior

appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development.” *Baker*, 95 Idaho at 584. “[W]hen private property rights clash with the public interest regarding our limited ground water supplies, in some instances at least, the private interests must recognize that the ultimate goal is promotion of the welfare of all our citizens.” *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584, 513 P.2d 627, 636 (1973).

- C55: It would be contrary to Idaho law of optimum and full economic development to curtail junior ground water user resulting in an \$8.1 *billion* dollar loss to the State’s economy for what is anticipated to be a very speculative gain of only \$423.5 million dollars. Moreover, the loss resulting from such a curtailment will also involve the loss of at least 3500 jobs and the death knoll to hundreds of farms and farming communities through southeastern Idaho.
- C56: The delivery call made by the SWC members unreasonably interferes with optimum and full economic development of the ESPA in contravention with Idaho law. Therefore, their call must be denied.

**VIII. THE DELIVERY CALLS MADE BY THE SURFACE WATER COALITION MUST BE DENIED BECAUSE CURTAILMENT BASED ON THOSE CALLS WOULD BE UNREASONABLY WASTEFUL AND THEREFORE FUTILE UNDER THE CONJUNCTIVE MANAGEMENT RULES.**

**Findings of Fact**

- F115: The State of Idaho has developed several ground water models of the ESPA over the last 30 years, each one representing an improvement over its predecessor. The most recent model is referred to as the Eastern Snake Plain Aquifer Model (ESPAM). (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 18-20).
- F116: The Idaho Water Resource and Research Institute utilized ESPAM to run a Curtailment Scenario which simulated the hypothetical curtailment of ground water irrigation rights junior to January 1st of the following years: 1870, 1949, 1961, 1973, and 1985. The 1870 curtailment date effectively represents complete curtailment of all ground water irrigation except that occurring under tribal rights and agreements (and thus considered exempt from curtailment). The other dates were selected for representative purposes and do not reflect the priority of any specific water right that might exert a delivery call. The principal aim of the scenarios was to illustrate the amounts and timing of reach gain effects that would stem from curtailment of ground water pumping. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 21).
- F117: Based on results from the original Curtailment Scenarios using v1.0 of the ESPAM (IWRRI, 2004), the complete curtailment of ground water pumping for irrigation would dry up 1.1 million acres of farm land and reduce consumptive use of ground water by 2.1 MAF per year (or about 2900 cfs on average). The reach gain effects of curtailment would be distributed both spatially and temporally. Scenario results indicate that reach

gains would increase in all connected river reaches and springs, though the effect would vary greatly from place to place. Reach gains would increase slowly over time, approaching steady state conditions only after decades of curtailment. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 21). Based on results of the 2006 "Curtailment Scenario" using the updated ESPAM v1.1, there is even less response to the respective river reaches due to curtailment of ground water when return flows from irrigation practices are considered.

- F118: At steady-state, after decades of curtailment of all ground water pumping on the Eastern Snake River Plain, only 38% of the increased reach gain from this curtailment would appear in the near Blackfoot to Neeley reach. More than half of this steady-state reach gain would accrue above Blackfoot or below Milner Dam. In the first irrigation season, only 5% of the foregone ground water consumption would accrue to the near Blackfoot to Neeley reach. In the first year of curtailment, only 11% would accrue to the reach. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 21-22).
- F119: However, all reach gains generated by curtailment will not accrue in a place or at a time where they can be used by the SWC entities. For example, reach gains accruing to the river below Neeley during the winter months would simply pass Milner Dam and leave the upper basin unused. Similarly, any winter gains that accrue above Neeley after American Falls Reservoir has filled would simply flow past Milner unused. The IDWR investigated the issue of usability of reach gains using the ESPAM in conjunction with the Department's Planning Model. The reach gains used in this analysis were the steady state gains accruing between Shelley and Milner from curtailment of ground water irrigation rights junior to January 1, 1961, calculated using v1.0 of the ESPAM. The steady state value of this reach gain was 888 cfs. Curtailment to this priority date would dry up 664,300 acres of ground water irrigated land (IWRRI, 2004). The long-term average increase in flow passing Milner Dam from the additional reach gain was determined to be 846 cfs, which is 95% of the 888 cfs steady state reach gain. **In other words, 95% of the reach gain from curtailment would pass Milner Dam unused because it could not be diverted or stored.** Significantly, this same basic problem was recognized in the 1946 Planning Report for the Palisades Project. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 22).
- F120: In considering these facts, keep in mind that the ESPAM has been shown to over-predict the impacts of ground water pumping on the reach gains below Blackfoot. Since the model over-predicts the benefit (in terms of reach gains) of curtailment, the amount of reach gain increase from curtailment would be even smaller than predicted by the model. (*Direct Testimony of Brendecke*, at 28-30).
- F121: This analysis demonstrates that most of the reach gains that could be generated by curtailment of ground water pumping would be unusable by the SWC entities. This is because the majority of them would arise in other reaches (above Blackfoot or below Milner) where they would not be accessible and because a substantial portion of those that would arise between Blackfoot and Milner would do so when there was no demand and no place to store them. The IDWR analysis found that the average amount of reach



gain not spilled past Milner would be 42 cfs, or approximately 33,600 af per year. At a typical diversion rate of 6 af per acre, this is sufficient to provide a surface water supply to about 5600 acres, or **less than 1% of the area dried up by the curtailment**. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 23).

- F122: Therefore it would make far more sense, in terms of efficiency of water use, to mitigate any material injury caused by ground water pumping by making targeted deliveries of storage water to the SWC entities in the occasional dry year. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 23).

### **Conclusions of Law**

- C57: The law of optimum development proscribes unreasonable waste of those resources: "The policy of the law of this state is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960); *Colthrop v. Mountain Home Irrigation District*, 66 Idaho 173, 180 (1945) (citing *State v. Twin Falls Canal Co.*, 21 Idaho 410, 411 (1911) ("... it is the policy of the law of this state to prevent the wasting of water"). In responding to a delivery call, the Director must consider whether the effect of the call will cause unreasonable waste. IDAPA 37.03.11.020.03, 37.03.11.040.03. Idaho law does not permit an appropriation to deprive the public from using a large quantity of water in order to support a fraction of that quantity to which the appropriator is entitled. *Schodde v. Twin Falls Water Co.*, 224 U.S. 107, 120 (1911).
- C58: Idaho jurisprudence lacks any finite definition of the point at which the waste of water becomes unreasonable. The typical example offered provides that a water use that results in 90% waste would be so unreasonable as to not be tolerated. The Montana Supreme Court has gone further in stating that "an appropriator has no right to ... cause the loss of two-thirds of a stream simply because he is following the lines of least resistance. Such a method of diversion would not be an economical use of the water..." *State ex rel. Crowley v. District Court*, 108 Mont. 89, 103, 88 P.2d 23, 30 (1939).
- C59: The Conjunctive Management Rules define a futile call as: "A delivery call made by the holder of a senior-priority surface or ground water right that, for physical and hydrologic reasons, cannot be satisfied within a reasonable time of the call by immediately curtailing diversions under junior-priority ground water right *or that would result in waste of the water resource*." CM Rule 42.010.08.
- C60: The Conjunctive Management Rule 20.04, to the extent it allows curtailment of junior-priority ground water users when the material injury or the benefit from curtailment is not measurable, violates the futile call doctrine under Idaho law and the Director's authority under I.C. 42-607 and 42-226 *et seq.*
- C61: "The policy of the law of this State is to secure the maximum use and benefit, and least wasteful use, of its water resources." *Poole v. Olaveson*, 82 Idaho 496, 502, 356 P.2d 61, 65 (1960).

- C62: Under the facts of this case, it is estimated that as much as 95% of the reach gain from curtailment will pass Milner unused and that the water from this reach gain that can be used would be sufficient to irrigate only 5600 which is only 1% of the entire number of acres dried up by the proposed curtailment.
- C63: This constitutes an unreasonable waste of the water. Under the Conjunctive Management Rules this also constitutes a futile call. Therefore, the delivery call made by the SWC members must be denied.

**IX. IDAHO LAW ALLOWS FOR REPLACEMENT OF WATER FROM ALTERNATIVE SOURCES TO MITIGATE MATERIAL INJURY, IF ANY IS FOUND TO EXIST.**

**Findings of Fact**

- F123: In the Director's May 2005 order, he determined that curtailment of all ground water irrigation in the ESPA junior to February 27, 1979 would over time generate 133,900 AF of increased reach gain in the near Blackfoot to Minidoka reach of the Snake River and that curtailment in Water Districts 120 and 130 would generate 101,000 AF of this increase. The Director ordered holders of these potentially curtailed ground water rights to provide mitigation in the form of replacement water or face curtailment. The Director ordered that the water replacement plan deliver at a minimum 27,000 AF within the 2005 irrigation season – which the Director believed represented an amount equal to the predicted irrigation season shortfall of the SWC members in 2005. The Director amended these requirements in subsequent orders. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 28).
- F124: In April 2005, IGWA submitted a Replacement Water Plan which was approved by the Director. This plan provided substantially more water than the 27,000 AF ordered by the Director. (*Brendecke Report 12/30/2005* at 28-29).
- F125: The Director however failed to recognize any replacement credit for mitigation activities undertaken in Water District 130 – primarily voluntary curtailments by ground water users – even though ground water use in Water District 130 was held in the May 2005 order to have materially injured SWC members. (Exhibit 4100 (*Brendecke Report 12/30/2005*) at 29).
- F126: In 2007, IGWA submitted a replacement water plan that guaranteed Twin Falls Canal Company 1,075,900 AF of water for that year as required by the Director's order, which as discussed above, actually exceeded and thereby enhanced their water supply over what it had historically diverted. (*Carlson Direct*, at 36).

**Conclusions of Law**

- C64: Idaho Code § 67-5232 and IDAPA 37.01.01.400 provide for a declaratory ruling from the Department of Water Resources.
- C65: No Idaho law precludes junior priority water users from utilizing replacement water from alternative sources to mitigate compensable shortages to the senior Spring Users water rights.
- C66: If material injury is found, a junior-priority ground water user is entitled to provide a replacement water to offset that injury.
- C67: Replacement water can be from any source when necessary to eliminate any material injury to a senior water user.
- C68: Therefore, in the event of material injury and threatened curtailment, junior priority ground water users have a legal right to provide mitigation water to avoid curtailment.
- X. FORCING GROUND WATER USER TO SPEND MILLIONS OF DOLLARS TO AVOID CURTAILMENT WITHOUT PROVIDING THEM A HEARING IS A VIOLATION OF DUE PROCESS AND CONSTITUTES A TAKING.**

**Findings of Fact:**

- F127: Water rights are real property rights, regardless of priority date.
- F128: The Director issued the May 2005 Order and subsequent amendments thereof without a hearing and pursuant to I.C. § 67-5247.
- F129: Curtailment of the junior-priority ground water rights was contemplated to be sustained and on-going unless mitigation or replacement water was provided. Such curtailment would result in the permanent loss of the junior-priority water rights.
- F130: IGWA provided mitigation/replacement water plans in 2005, 2006 and 2007 at great expense to avoid the curtailment and loss of their water rights.

**Conclusion of Law:**

- C69: Depriving a person of their property without a pre-deprivation hearing can only occur in the most exceptional of circumstances.
- C70: The Director issued his May 2005 Orders and amendments thereto without a pre-deprivation hearing.
- C71: The Director abused his discretion when he issued the Order and amendments thereto “emergency orders” under I.C. § 67-5247 which allows the agency to act “in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.” (emphasis added). The emergency action was not justified.

- C72: The shortage of water for the SWC does not and did not constitute an “immediate danger to the public health, safety, welfare requiring immediate agency action.”
- C73: The agency action to curtail hundreds of ground water users was not “necessary to prevent or avoid the immediate danger.” I.C. § 67-5247(1).
- C74: The agency did not “proceed as quickly as feasible to complete any proceedings that could be required.” I.C. § 67-5247(4).
- C75: The ground water users were forced to spend millions of dollars to avoid immediate physical curtailment while their requests for hearing went unmet. Thus, they were denied due process of law.
- C76: The ground water users’ expenditure of millions of dollars to protect their property rights resulted in an unjust taking by the Department of Water Resources without compensation in violation of the due process requirements under the State of Idaho and the United States’ Constitutions.

RACINE, OLSON, NYE, BUDGE &  
BAILEY, CHARTERED

By   
SCOTT J. SMITH

## CERTIFICATE OF SERVICE

I hereby certify that on this 21<sup>th</sup> day of December, 2007, I served a true and correct copy of the foregoing by delivering it to the following individuals by the method indicated below, addressed as stated.

Mr. David R. Tuthill	<input type="checkbox"/>	U.S. Mail
Director	<input type="checkbox"/>	Facsimile
Idaho Department of Water Resources	<input type="checkbox"/>	Overnight Mail
322 East Front Street	<input checked="" type="checkbox"/>	Hand Delivery
P.O. Box 83720	<input checked="" type="checkbox"/>	E-Mail
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<a href="mailto:Dave.tuthill@idwr.idaho.gov">Dave.tuthill@idwr.idaho.gov</a>		

Gerald F. Schroeder	<input type="checkbox"/>	U.S. Mail
Hearing Officer	<input type="checkbox"/>	Facsimile
<a href="mailto:fcjschroeder@gmail.com">fcjschroeder@gmail.com</a>	<input type="checkbox"/>	Overnight Mail
	<input checked="" type="checkbox"/>	Hand Delivery
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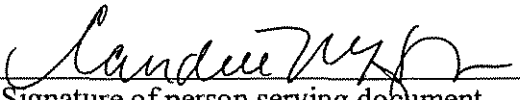
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